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Office of Inspector General
United States Department of State

AUD-MERO-20-24

Office of Audits

April 2020

**Management Assistance Report:
Legal Determination Concerning
Department of State Non-Acquisition
Interagency Agreements Is Needed**

MANAGEMENT ASSISTANCE REPORT

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Summary of Review

During the *Audit of Monitoring and Evaluating Department of State Foreign Assistance in the Philippines*,¹ the Department of State (Department) Office of Inspector General (OIG), Office of Audits, learned that the Department had used a “notice to proceed” to extend the period of performance for a non-acquisition interagency agreement (IAA),² even though Department policy does not explicitly recognize this as a valid mechanism for extending an IAA’s period of performance. In addition, OIG found that Department policy is silent on whether non-acquisition IAAs have the potential to create unauthorized commitments and, if so, whether ratification procedures are required when an unauthorized commitment involving an IAA does occur. OIG made four recommendations to address these issues. Specifically, OIG recommended that the Office of the Legal Adviser, which the Department has stated is responsible for these issues, render a legal determination on the appropriateness of using a notice to proceed to extend the period of performance for a non-acquisition IAA and whether ratification procedures are required when an unauthorized commitment involving an IAA occurs. OIG also recommended that the Bureau of Administration, Office of the Procurement Executive, incorporate the legal determinations in Department policy once finalized and communicate the policy to all relevant stakeholders. On the basis of an April 7, 2020, email from the Office of the Legal Adviser and written comments provided by the Office of the Procurement Executive in response to a draft of this report (see Appendix A), OIG considers all four recommendations resolved, pending further action. A synopsis of management’s comments to the recommendations offered and OIG’s reply follow each recommendation in the body of this report. The Office of the Procurement Executive’s response to a draft of this report is reprinted in its entirety in Appendix A.

BACKGROUND

OIG conducted the *Audit of Monitoring and Evaluating Department of State Foreign Assistance in the Philippines* to determine whether Department-funded foreign assistance programs implemented in the Philippines were monitored and evaluated in accordance with Federal and Department requirements. To meet the objectives of this audit, OIG reviewed a selected group of foreign assistance awards, including two non-acquisition IAAs. One of the IAAs was between the Bureau of Counterterrorism and Countering Violent Extremism (CT) and the Department of Justice (DOJ) for the Resident Legal Advisor Program to assist the Philippine Government in improving its criminal justice capacity to counter terrorism. The period of performance for this IAA was September 27, 2017, through December 31, 2019, and the award was for \$1.3 million.

¹ AUD-MERO-19-39, September 2019.

² An IAA is a written agreement between two Federal agencies that specifies the goods to be furnished or tasks to be accomplished by one agency in support of the other (Bureau of Administration, Office of the Procurement Executive, internal IAA website). If the principal purpose is for the servicing agency to award a grant, supply goods from inventory, or use agency personnel, the agreement is a non-acquisition IAA and it is currently subject to the guidance set forth in Procurement Information Bulletin 2014-05, “Non-Acquisition Interagency Agreements.”

As OIG conducted its review of the Resident Legal Advisor IAA, it learned that this program was actually funded through three IAAs: one between CT and DOJ, which was reviewed in OIG's audit; one between the Bureau of International Narcotics and Law Enforcement Affairs and DOJ; and one between CT and DOJ, with a period of performance of September 9, 2016, to September 30, 2017. Because the latter two IAAs directly affected OIG's audit, OIG conducted a limited-scope review of these IAAs, and two issues came to OIG's attention. Specifically, for the IAA between CT and DOJ, with the period of performance that ended on September 30, 2017: (1) CT used a "notice to proceed" to extend the period of performance of this IAA on two occasions, and (2) the IAA was not properly modified to extend the period of performance until April 2019. Accordingly, OIG concluded that CT may have taken actions that led DOJ to make unauthorized commitments by obligating and liquidating funds past the period of performance. If there were an unauthorized commitment, ratification—the act of approving that unauthorized commitment by an official who has the authority to do so—would typically be required.

OIG reviewed the Department's policy on non-acquisition IAAs—Procurement Information Bulletin 2014-05, "Non-Acquisition Interagency Agreements"—for guidance regarding these two issues, but neither is addressed. Therefore, OIG is recommending that the Office of the Legal Adviser render a legal determination on the appropriateness of using a notice to proceed to extend the period of performance for a non-acquisition IAA and whether ratification procedures are required when an unauthorized commitment involving an IAA occurs. OIG is also recommending that the Bureau of Administration, Office of the Procurement Executive, incorporate the legal determinations in Department policy, once finalized, and communicate that policy to all relevant stakeholders.

LEGAL DETERMINATION CONCERNING DEPARTMENT NON-ACQUISITION INTERAGENCY AGREEMENTS IS NEEDED

OIG found during its limited-scope review that CT provided DOJ with two "notices to proceed" for the IAA that ended on September 30, 2017, and CT did not execute a formal modification to the IAA until April 11, 2019. Because Procurement Information Bulletin 2014-05 does not recognize a "notice to proceed" as a valid method for extending the period of performance of an IAA, OIG considered the payments made outside the period of performance unallowable. In addition, OIG found that CT allowed DOJ to make unauthorized commitments by obligating and liquidating funds past the period of performance for this IAA, which would typically require ratification. Furthermore, OIG learned that Department policy, specifically Procurement Information Bulletin 2014-05, is silent on whether unauthorized commitments can occur under a non-acquisition IAA and whether ratification procedures are required when an unauthorized commitment involving an IAA occurs.

Notice To Proceed for Non-Acquisition Interagency Agreements

For the IAA between CT and DOJ that ended on September 30, 2017, CT provided two notices to proceed to DOJ via email to extend the period of performance and "continue implementing

the services agreed to” under this IAA. The first notice to proceed was given on September 26, 2017, extending the period of performance to September 30, 2018, and the second notice to proceed was given on September 28, 2018, extending the period of performance to September 30, 2019. Procurement Information Bulletin 2014-05 does not explicitly recognize a “notice to proceed” as a valid method for extending the period of performance of an IAA. Instead, the Bulletin merely states that if an IAA period exceeds 1 year, “[a]ppropriate changes will be made by amendment to the [general terms and conditions] and/or modification to any affected order(s).”

OIG reviewed Federal and Department policies for other types of awards—including those for contracts and those for Federal financial assistance—to obtain an understanding of what, if any, guidance is provided in those contexts with respect to the proper use of a notice to proceed. The Federal Acquisition Regulation, which governs acquisitions usually by contract, discusses a notice to proceed only in conjunction with construction contracts. The Department’s Federal Assistance Directive, which applies to Federal financial assistance such as grants and cooperative agreements,³ does not even mention a notice to proceed.

OIG considered the payments made outside the period of performance unallowable and recommended that CT determine the allowability of the costs that were questioned by OIG. In addition, OIG recommended that CT obtain a refund from DOJ for all payments determined to be unallowable. In response to the recommendation, CT disagreed with OIG and stated that, although it concedes that it was not timely in issuing the formal IAA modification, “there were two notice to proceeds in place for this award allowing [DOJ] to continue operating in compliance with appropriations law.” CT stated that it “will revise its notice to proceed procedures to ensure that a lag time such as this will not occur again.” In light of these responses and the suggestion that any changes will be limited to the use of notices to proceed rather than an overall assessment of the appropriateness of this approach, OIG remains concerned that CT, and perhaps other bureaus, are improperly using a notice to proceed to extend the period of performance of an IAA. Without clear guidance on the appropriate methods for extending the period of performance for non-acquisition IAAs, the Department may be administering agreements incorrectly. OIG therefore offered the following recommendations.

Recommendation 1: OIG recommends that the Office of the Legal Adviser render a legal determination regarding the use of a notice to proceed to extend the period of performance for a non-acquisition interagency agreement and provide this legal determination to the Bureau of Administration, Office of the Procurement Executive, for codification into Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements.

Management Response: The Office of the Legal Adviser did not provide an official response to a draft of this report. However, on April 7, 2020, the Office of the Legal Adviser stated in

³ The Federal Assistance Directive, Version 3.0, October 2018, 2, states that it “does not contain policies or procedures for interagency agreements or transfers between U.S. Government agencies.”

an email to OIG that it is “prepared to support both recommendations, with the Office of the Assistant Legal Adviser for Buildings and Acquisitions preparing the legal reviews in coordination with other offices within the Office of the Legal Adviser as appropriate.”

OIG Reply: On the basis of the email received from the Office of the Legal Adviser, OIG considers the recommendation resolved, pending further action. This recommendation will be closed when OIG receives and accepts documentation demonstrating that the Office of the Legal Adviser has rendered a legal determination regarding the use of a notice to proceed to extend the period of performance for a non-acquisition interagency agreement and provided this legal determination to the Bureau of Administration, Office of the Procurement Executive, for codification into Procurement Information Bulletin 2014-05 and other Department policy governing non-acquisition interagency agreements.

Recommendation 2: OIG recommends that the Bureau of Administration, Office of the Procurement Executive, update Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements, once it receives the legal determination resulting from Recommendation 1, regarding the use of a notice to proceed to extend the period of performance for a non-acquisition interagency agreement, to incorporate the policy and communicate the determination to all relevant stakeholders.

Management Response: The Office of the Procurement Executive stated that it concurs with the recommendation, “pending the legal determination resulting from Recommendation 1.”

OIG Reply: On the basis of the Office of the Procurement Executive’s response (see Appendix A), OIG considers the recommendation resolved, pending further action. This recommendation will be closed when OIG receives and accepts documentation demonstrating that, once it receives the legal determination resulting from Recommendation 1, the Office of the Procurement Executive updated Procurement Information Bulletin 2014-05 and other Department policy governing non-acquisition interagency agreements.

Ratification Procedures for Non-Acquisition Interagency Agreements

An entity may charge to the Federal award only allowable costs incurred during the period of performance. Because a formal modification for this IAA was not executed until April 11, 2019, OIG concluded that CT allowed DOJ to make unauthorized commitments by obligating and liquidating funds past its period of performance. However, Procurement Information Bulletin 2014-05 is silent on whether ratification procedures are required when an unauthorized commitment involving an IAA occurs.

When an unauthorized commitment occurs for other types of awards, such as grants or contracts, Federal⁴ and Department⁵ policies applicable to the awards provide clear guidance regarding what constitutes an unauthorized commitment and what procedures must be implemented to ratify that unauthorized commitment. For example, the Federal Assistance Directive states that unauthorized commitments “may violate Federal law, are inconsistent with the Department’s Federal financial assistance policy, and can carry severe consequences.” The Directive further states, “All unauthorized commitments that exceed \$1,000 must be submitted to the Office of the Procurement Executive for ratification through, and with the concurrence of, the individual’s supervisor and the warranted [Grants Officer].”

During the audit, OIG contacted the Office of the Procurement Executive, which confirmed that no guidance exists on ratification procedures for unauthorized commitments on non-acquisition IAAs. In response to OIG’s recommendation addressing this issue, the Office of the Procurement Executive replied that, in consultation with the Office of the Legal Adviser, ratification under the Federal Acquisition Regulation is inapplicable because an IAA “is not a grant or acquisition, and therefore cannot be treated as such an arrangement.”⁶ The Office of the Procurement Executive further stated that it deferred to the Office of the Legal Adviser for additional legal analysis, given that that office “reviews both acquisition and non-acquisition IAA’s for legal sufficiency.” OIG recognizes that ratification under the Federal Acquisition Regulation or the Federal Assistance Directive is not applicable because an IAA is not an acquisition or a grant. However, OIG’s concern is primarily with the overall lack of clear guidance provided to Department personnel regarding unauthorized commitments and ratification for non-acquisition IAAs. Without a determination on whether unauthorized commitments can occur under a non-acquisition IAA and, if so, whether ratification should occur, the Department cannot be assured that it is in full compliance with appropriations law and fiscal policy. Therefore, OIG offered the following recommendations.

Recommendation 3: OIG recommends that the Office of the Legal Adviser (a) render a legal determination regarding whether unauthorized commitments can occur under a non-acquisition interagency agreement and whether ratification procedures are required and, if so, (b) develop, in coordination with the Bureau of Administration, Office of the Procurement Executive, ratification procedures for non-acquisition interagency agreements for the Department of State.

⁴ Federal Acquisition Regulation, 1.602-3, “Ratification of unauthorized commitments.”

⁵ Federal Assistance Directive, Version 3.0, October 2018, 62–63, “L. Unauthorized Commitments.”

⁶ As noted in the underlying report that prompted this MAR, OIG recognizes that the IAA in question was authorized under the Foreign Assistance Act and not under the Economy Act. However, the Comptroller General has found that “there are still situations in which it is legitimate to look to the Economy Act for guidance even though, strictly speaking, it does not apply, an example being where the statute prescribes reimbursement only in general terms.” See e.g., *72 Comp. Gen. 159, 163–64 (1993)* (term ‘reimbursable basis’ in statute directing agencies to furnish certain services to Nuclear Regulatory Commission can include ‘added factor’ for overhead). The existence of this and related authority further supports OIG’s concerns regarding these issues as well as its ultimate recommendation to address this matter through clear guidance. Regardless of the Department’s ultimate conclusions, clear direction to its employees will facilitate appropriate management of these agreements.

Management Response: The Office of the Legal Adviser did not provide an official response to a draft of this report. However, on April 7, 2020, the Office of the Legal Adviser stated in an email to OIG that it is “prepared to support both recommendations, with the Office of the Assistant Legal Adviser for Buildings and Acquisitions preparing the legal reviews in coordination with other offices within the Office of the Legal Adviser as appropriate.”

OIG Reply: On the basis of the email received from the Office of the Legal Adviser, OIG considers the recommendation resolved, pending further action. This recommendation will be closed when OIG receives and accepts documentation demonstrating that the Office of the Legal Adviser has (a) rendered a legal determination regarding whether unauthorized commitments can occur under a non-acquisition interagency agreement and whether ratification procedures are required and, if so, (b) developed, in coordination with the Bureau of Administration, Office of the Procurement Executive, ratification procedures for non-acquisition interagency agreements for the Department.

Recommendation 4: OIG recommends that the Bureau of Administration, Office of the Procurement Executive, update Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements, once it receives the legal determination and ratification procedures resulting from Recommendation 3, to incorporate the policy and communicate the ratification procedures to all relevant stakeholders.

Management Response: The Office of the Procurement Executive stated that it concurs with the recommendation, “pending the legal determination resulting from Recommendation 3.”

OIG Reply: On the basis of the Office of the Procurement Executive’s response, OIG considers the recommendation resolved, pending further action. This recommendation will be closed when OIG receives and accepts documentation demonstrating that, once it receives the legal determination and ratification procedures resulting from Recommendation 3, the Office of the Procurement Executive updated Procurement Information Bulletin 2014-05 and other Department policy governing non-acquisition interagency agreements.

RECOMMENDATIONS

Recommendation 1: OIG recommends that the Office of the Legal Adviser render a legal determination regarding the use of a notice to proceed to extend the period of performance for a non-acquisition interagency agreement and provide this legal determination to the Bureau of Administration, Office of the Procurement Executive, for codification into Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements.

Recommendation 2: OIG recommends that the Bureau of Administration, Office of the Procurement Executive, update Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements, once it receives the legal determination resulting from Recommendation 1, regarding the use of a notice to proceed to extend the period of performance for a non-acquisition interagency agreement, to incorporate the policy and communicate the determination to all relevant stakeholders.

Recommendation 3: OIG recommends that the Office of the Legal Adviser (a) render a legal determination regarding whether unauthorized commitments can occur under a non-acquisition interagency agreement and whether ratification procedures are required and, if so, (b) develop, in coordination with the Bureau of Administration, Office of the Procurement Executive, ratification procedures for non-acquisition interagency agreements for the Department of State.

Recommendation 4: OIG recommends that the Bureau of Administration, Office of the Procurement Executive, update Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements, once it receives the legal determination and ratification procedures resulting from Recommendation 3, to incorporate the policy and communicate the ratification procedures to all relevant stakeholders.

ABBREVIATIONS

CT	Bureau of Counterterrorism and Countering Violent Extremism
IAA	interagency agreement
DOJ	Department of Justice
Department	Department of State
OIG	Office of Inspector General

APPENDIX A. OFFICE OF THE PROCUREMENT EXECUTIVE'S RESPONSE



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United States Department of State

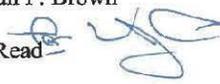
Washington, D.C. 20520

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March 10, 2020

MEMORANDUM

TO: OIG/AUD – Norman P. Brown

FROM: A/OPE – Cathy J. Read 

SUBJECT: Management Assistance Report: Legal Determination Concerning Department of State Non-Acquisition Interagency Agreements Is Needed

Thank you for the opportunity to provide a compliance update on the draft subject report. The point of contact for this report is the OPE Front Office (A-OPEFrontOfficeAssistants@state.gov).

Recommendation 2: OIG recommends that the Bureau of Administration, Office of the Procurement Executive, update Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements, once it receives the legal determination resulting from Recommendation 1, regarding the use of a notice to proceed to extend the period of performance for a non-acquisition interagency agreement, to incorporate the policy and communicate the determination to all relevant stakeholders.

Management Response to Draft Report (03/10/2020): The Bureau of Administration, Office of the Procurement Executive concurs pending the legal determination resulting from Recommendation 1.

Recommendation 4: OIG recommends that the Bureau of Administration, Office of the Procurement Executive, update Procurement Information Bulletin 2014-05 and other Department of State policy governing non-acquisition interagency agreements, once it receives the legal determination and ratification procedures resulting from Recommendation 3, to incorporate the policy and communicate the ratification procedures to all relevant stakeholders.

Management Response to Draft Report (03/10/2020): The Bureau of Administration, Office of the Procurement Executive concurs pending the legal determination resulting from Recommendation 3.

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